Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF
THE UNITED STATES

October Term, 1975

No. 75-686

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION 2, STATE OF OKLAHOMA AND TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

E. E. "IKE" ZAMRZLA,

Petitioner,

-vs-

HENRY C. SANDERS,

Respondent.

RICHARD D. HAMPTON
Attorney for Petitioner
510 Oil & Gas Building
Oklahoma City, Oklahoma 73102
Telephone: A/C: 405-235-9363

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

E. E. "IKE" ZAMRZLA,
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Petitioner,
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-vs-
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HENRY C. SANDERS,
)
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Respondent.)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION 2, STATE OF OKLAHOMA AND TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner prays that a Writ of Certiorari issue to review the opinion of the Court of Appeals, Division 2, State of Oklahoma, in which said Appellate Court did on August 12, 1975 reverse the decision rendered on April 8, 1974 by the Honorable Carmon C. Harris, Judge of the District Court of Oklahoma County; the denial of the rehearing in said matter by the said Appellate Court on September 4, 1975; and the denial of Certiorari by the Supreme Court of Oklahoma on October 28, 1975.

OPINIONS BELOW

There were no official reports of any of the opinions by the District Court of Oklahoma County, the Court of Appeals, Division 2, of the State of Oklahoma, nor the Supreme Court of the State of Oklahoma and pursuant to the provisions of Title 20, Oklahoma Statutes 1971, Section 30.5 and Title 12, Oklahoma Statutes Annot., Chapter 15, Appendix 2, New Policy

on Publication of Appellate Decisions, adopted September 24, 1973 by the Supreme Court of Oklahoma, even unofficial publication of said opinion of the Court of Appeals, Division 2, of the State of Oklahoma was not allowed by the Supreme Court of Oklahoma. The pertinent part of the opinion of the Honorable Carmon C. Harris, Judge of the District Court of Oklahoma County, is appended hereto, marked Exhibit "A" and made a part hereof; the full opinion of the Court of Appeals, Division No. 2, of the State of Oklahoma is appended hereto, marked Exhibit "B" and made a part hereof; the pertinent part of the Order of the said Appellate Court denying petitioner a rehearing is appended hereto, marked Exhibit "C" and made a part hereof, and the pertinent part of the Order denying petitioner Certiorari by the Supreme Court of Oklahoma is appended hereto, marked Exhibit "D" and made a part hereof.

JURISDICTION

The opinion of the Court of Appeals, Division No. 2, of the State of Oklahoma was rendered on August 12, 1975. A petition for re-hearing was denied petitioner by said Court on September 4, 1975 and a Petition for Certiorari was denied petitioner by the Supreme Court of Oklahoma on October 28, 1975, and pursuant to the provisions of Rule 3.16 of the Supreme Court of Oklahoma, Title 12 Oklahoma Statutes, Chapter 15, Appendix 3, petitioner may file no petition for re-hearing of same in the Oklahoma Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1257 (3).

QUESTIONS PRESENTED

Whether to approve and effectuate a plaintiff's dismissal without prejudice to the filling of a future action after a jury had been selected and impanelled and opening statements had been made by both counsel for plaintiff and defendant

violates the due process clause of the 5th and 14th Amendments and the double jeopardy clause of the 5th Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Due process clause of the 5th and 14th Amendments and the double jeopardy clause of the 5th Amendment to the United States Constitution.

STATEMENT OF THE CASE

An action for damages was commenced by respondent against petitioner in the District Court of Oklahoma County on December 13, 1972, for malpractice in performance of his duties as an attorney. To plaintiff's petition petitioner filed a demurrer which was presented to the trial court on April 13, 1973, and overruled. Thereafter petitioner did file a timely answer to respondent's petition, a pre-trial conference was held in said matter on or about March 27, 1974 and the matter came on for trial on the 8th day of April, 1974. A jury was duly selected and impanelled and opening statements were made to said jury by respective counsel. After petitioner had concluded his opening statement respondent did interpose a motion for judgment on same and thereupon petitioner renewed his demurrer to respondent's petition, objection to the introduction of any evidence under same and moved for a directed verdict on the opening statement of respondent. Thereafter or concurrently with the presentation of said demurrer and motions petitioner did present and obtain leave of Court to file a Brief in support of same. The transcript and original record fails to show any brief submitted by respondent during any stage of the proceeding before the Trial Court even though under "Part H. Trial Brief and Instructions Requested by Court" of the pre-trial order resulting from said pre-trial conference the following language appears: "to be provided". After said argument began on said motions and before the Trial Court had ruled

on any of same, respondent did by and through his counsel make the following bare statement and no more: "Comes now the plaintiff at this time and dismisses his petition". To this latter statement of respondent petitioner immediately objected because of his pending motion. The Trial Judge did then adjourn Court until 1:00 P.M. at which time respondent presented to the Court a written dismissal of his case without prejudice to its re-filing. It was not until after counsel for respondent had cited and argued from an Oklahoma Supreme Court case that any reason was given for dismissing his petition without prejudice. Thereafter and without objection from respondent the jury was dismissed and the Trial Court after having heard argument from respective counsel did between the hours of 4:00 and 5:00 P.M. sustain petitioner's objection to the introduction of evidence under respondent's petition and dismissed respondent's case at his cost and after said ruling respondent requested leave to file an amended petition, which request was denied by the trial court.

To such adverse ruling of the Trial Court respondent did thereafter file a timely petition in error in the Supreme Court of Oklahoma. After briefs had been submitted by the respective parties the Supreme Court did, pursuant to the provisions of 20 Oklahoma Statutes 1971, Section 30.1, assign such case to the Court of Appeals, Division 2, which latter Court did on August 12, 1975 render its decision in which it did reverse the action of the Trial Court and did by way of dictum express an opinion that the Trial Court was also in error in not allowing respondent the opportunity to amend his petition after sustaining petitioner's demurrer to same. Thereafter and pursuant to the provisions of Rule 3.9 of Title 12, Oklahoma Statutes 1971, Chapter 15, Appendix 3, petitioner did file a petition for rehearing combined with brief in its support in the Court of Appeals, Division 2, State of Oklahoma. On September 4, 1975, said petition for rehearing was denied and thereafter petitioner did pursuant to the provisions of Rule 3.13 of Title 12, Oklahoma Statutes 1971, Chapter 15, Appendix 3, file a petition for certiorari in the Supreme Court of Oklahoma. On

October 28, 1975, said petition for certiorari was denied by the Supreme Court of Oklahoma and pursuant to the provisions of Rule 3.16 of Title 12, Oklahoma Statutes 1971, Chapter 15, Appendix 3, petitioner may not file a petition for rehearing on said petition for certiorari in the Supreme Court of Oklahoma and therefore has no further remedy for appellate review in the State Courts of Oklahoma.

FEDERAL QUESTIONS RAISED IN THE APPELLATE COURTS

PART A. COURT OF APPEALS, DIVISION 2, STATE OF OKLAHOMA.

Since all decisions of the Trial Court were favorable to petitioner there was no necessity to raise any Federal questions in any of the proceedings before same and the decision of the Court of Appeals, Division 2, State of Oklahoma was the first tribunal to rule against petitioner. After this unfavorable decision was received, petitioner did in the only manner available to him under the aforesaid rules of the Supreme Court of Oklahoma, raise the due process clause guaranteed him by the 5th and 14th Amendments of and to the Constitution of the United States of America and Article 2, Section 7, of the Oklahoma Constitution as Reason 5 in his Petition for Rehearing for the reasons given in the four preceding reasons thereof and did argue same under Proposition 5 of his brief filed by and in support of said Petition for Rehearing. Petitioner was unable to directly raise said Federal Questions in his Petition for Certiorari in the Supreme Court of Oklahoma but could only indirectly raise the same by virtue of Rule 3.14 of Title 12, Oklahoma Statutes 1971, Chapter 15, Appendix 3, which provides in part as follows:

> "The petition for certiorari shall contain only the following words: Plaintiff (defendant) in error seeks Certiorari to review the decision of the Court of Appeals, Division Number... filed herein... (date)

. . . , for the reasons stated in the petition for rehearing to the Court of Appeals,

Respectfully submitted,
(signed) . . "

Therefore, these grounds specifying error were before the Court of Appeals, Division 2, at and after the time petitioner did file his Petition for Rehearing and were before the Supreme Court of Oklahoma at and after the time petitioner filed his Petition for Certiorari.

ARGUMENT

Certiorari should be granted in the instant case because the Court of Appeals Division 2, and the Supreme Court of Oklahoma have so far departed from the accepted and judicial course of proceedings in ordering such a departure by the Trial Court in reversing same as to call for an exercising of this Court's power of supervision.

The pertinent statute and part thereof before the Trial Court, the Court of Appeals, Division 2, and the Supreme Court of Oklahoma, is 12 Oklahoma Statutes 1971, Section 683, providing in part as follows:

> "An action may be dismissed without prejudice to a future action:
>
> First: By the plaintiff before the final submission of the case to the jury or to the Court, where the trial is by the Court . . . ,"

The entirety of that statute had been enacted and/or adopted by the State of Nebraska and Ohio before Oklahoma had become a State. **State v. Scott, 36 N.W. 121.** In this case the Supreme Court of Nebraska held that a plaintiff cannot dismiss after a demurrer to a petition is submitted to the Court for decision. In the case of **Bainum v. Patton, 242 N.E. 2d 598,** the Court of Common Pleas of Ohio, Hamilton County, did in

the year 1968 rule that a Trial Court had the right to exercise its sound discretion in determining whether it will consider a case as finally submitted to it. The Supreme Court of Oklahoma, however, held in the year 1932 that the sustaining of a demurrer to a petition was not a final submission and that the plaintiff had the right to dismiss his case without prejudice. **Carpenter v. Renner, 158 Okl. 153, 12 P. 2d 688.** Though the Supreme Court of Oklahoma has held in later decisions that the sustaining of a demurrer to a petition is a decision on the merits of a case, the Court of Appeals, Division 2, and the Supreme Court of Oklahoma, apparently by denying petitioner's Petition for Certiorari still applies **Carpenter v. Renner, supra,** to the instant case. **Powell v. Chastain, Okl. 359 P. 2d 336. Martin v. Jackson, Okl. 261 P. 2d 878 and Christner v. Christner, 203 Okl 581, 224 P. 2d 594.**

Since the year 1400 A.D. under both English and American jurisprudence, the right of a plaintiff to dismiss without prejudice after trial has begun has been increasingly restricted. **Washburn v. Allen, 77 Me. 344 and 28 U.S.C.A., F.R.C.P. Rule 41.**

The Trial Court was cognizant of this modern trend as evidenced by that part of his opinion appended hereto as Exhibit "A", and was further of the opinion that this trend was recognized by the Supreme Court of Oklahoma in its rules for the District Courts of Oklahoma, effective September 1, 1973, and apparently relied at least in part on said rules in making his decision. As shown by copy of the opinion of the Court of Appeals, Division 2, appended hereto as Exhibit "B" no mention of said rules was made therein. If the Court of Appeals, Division 2 and the Supreme Court of Oklahoma are of the opinion that the same construction should be placed upon the aforesaid part of 12 Oklahoma Statutes 1961, Section 683, as the latter Court placed on same in the year 1932 in **Carpenter v. Renner, supra,** and that the pertinent rules of the Supreme Court of Oklahoma do not alter same, said latter appellate court is not without power to make a rule which may even be in conflict with 12

Oklahoma Statutes 1971 § 683. In 1968 the Oklahoma legislature repealed Title 20 Oklahoma Statutes 1961, Section 13, which, inter alia, prohibited the Supreme Court of Oklahoma from making rules in conflict with any statute and enacted Title 20 Oklahoma Statutes 1971, Section 23 (7) which empowered the Supreme Court of Oklahoma to make rules and orders as may appear advisable to bring about a more speedy administration of justice within this State.[1] In 1932 when **Carpenter v. Renner, supra,** was decided the wheels of justice were not turning much faster than the economy which was hardly moving at all. But since at least the end of World War II the hue and cry throughout the land in increasing volume each year and each day is "justice delayed is justice denied" and the Oklahoma legislature was apparently congnizant of this trend when it repealed the former said statute and enacted the latter, and petitioner contends that in view of said acts by the Oklahoma legislature that it is an anachronism in this day and time to allow a plaintiff to dismiss his action without prejudice to the filing of a future action after a jury has been impanelled and opening statements made by respective counsel.

The original record in this case fails to disclose that petitioner ever engaged in any tactics which would have delayed the trial of this matter before the Trial Judge, fails to disclose that petitioner ever requested a continuance, but on the contrary and as evidenced by opening statement of his counsel, shows that petitioner was fully prepared for trial.

To subject petitioner, an active, practicing attorney, but also an attorney who is wise enough to know that he should not represent himself, but to engage and pay other counsel to represent him in litigation, to another action involving the subject matter herein would unlawfully deprive him of liberty and property guaranteed by the 5th and 14th Amendments and would subject him for the same offense to be put twice in jeopardy of life or limb prohibited by the said 5th Amendment to the Constitution of the United States of America by virtue of the development of restrictions on a right of plaintiff to dismiss

1. See also In Re: Constitutionality of Section 251.18, Wis. Statutes, 236 N.W. 717, Seiler v. State, 112 Wis. 293, 87 N.W. 1072, Article 7, § 4, of the Constitution of Oklahoma, Cleveland Rwy. Co. v. Halliday, et al., 188 N.E. 1, People v. Callopy, et al., 192 N.E. 634 and State v. Roy, 60 P. 2d 646.

without prejudice after trial had begun under English and American jurisprudence from 1400 A.D. to the present time insofar as rights of defendants are affected and by virtue of respondent's tactics in attempting to dismiss when he did and requesting leave to amend only after the hour of 4:00 P.M. and after the jury had been dismissed as a result of being apparently unable to respond to petitioner's brief when from the pre-trial order it should have been apparent that petitioner was going to have a brief or at least instructions to the jury in that such tactics are abhorrent to modern 20th century practice and procedure.

By virtue of Title 20 Oklahoma Statutes 1971, Section 30.1, petitioner cannot appeal, as such, to any other appellate court in the State of Oklahoma from the decision rendered by the Court of Appeals, Division 2, and is not entitled to a review of said decision by the Supreme Court of Oklahoma as a matter of right and since by virtue of Title 20 Oklahoma Statutes 1971, Section 30.5 and the denial of publication of the opinion of the Court of Appeals, Division 2, in the instant matter, petitioner is further denied equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States in that said division of said Court of Appeals or another division thereof, is not prevented from rendering a decision contrary to the one in the instant case on the same or a similar set of facts perhaps even as early as tomorrow, since by virtue of certain of the provisions of said last cited statute the opinion of the Court of Appeals, Division 2, in the instant case is not binding nor may same be cited as precedent.

This Court is, therefore, petitioner's only and last resort for his grievances heretofore complained of.

Wherefore, petitioner respectfully requests that a Writ of Certiorari issue to the Supreme Court of Oklahoma and the Court of Appeals, Division 2, of the State of Oklahoma, to

reinstate and affirm the decision of the Trial Court in the instant case.

RICHARD D. HAMPTON
Attorney for Petitioner
510 Oil & Gas Building
Oklahoma City, Oklahoma 73102
Telephone: A/C: 405-235-9363

APPENDIX

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

HENRY C. SANDERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CJ-72-3624
	)	
E. E. IKE ZAMRZLA,	)	
	)	
Defendant.	)	

FINDINGS OF THE COURT
APRIL 8, 1974

HONORABLE CARMON C. HARRIS

APPEARANCES:

FOR THE PLAINTIFF	Leamon Freeman Attorney at Law Oklahoma City, Oklahoma
FOR THE DEFENDANT	Richard Hampton Attorney at Law Oklahoma City, Oklahoma

REPORTED BY:

MARY O'LEARY
Official Court Reporter
821 Courthouse Building
Oklahoma City, Oklahoma

THE COURT: In the first place the Court is of the opinion that it has no discretion to determine whether the plaintiff may dismiss without prejudice and the Court does not exercise any discretion.

EXHIBIT A

The Court is of the opinion that the only question involved is whether the plaintiff has the right to dismiss without prejudice as a legal right.

At the conclusion of the opening statements by both counsel, the plaintiff interposed a Motion for Judgment on the opening statement which the Court would have overruled. Following this motion the defendant made a Motion for Judgment on the opening statement, which the Court would have overruled for the following reasons.

The Court is of the opinion that only in those cases where the counsel for a party makes a conscious and intelligent statement wherein that statement would bar his recovery if made by the plaintiff, or would confess judgment if made by the defendant, are proper cases in which Motion for Judgment on the opening statement may be sustained.

The Court is of the opinion that the plaintiff does not have to detail all of his evidence in the opening statement, nor does the defendant have to set forth all of his expected evidence in the opening statement. They are what they are designated, "opening statements" and are only intended to aid the jury in appreciating and evaluating the evidence when they see or hear it.

The role of demurrer to the Petition and objection to the evidence for the reason that the Petition does not state a cause of action is entirely different. The Petition is the vehicle which sets forth in a formal way the complaints and allegations of the plaintiff and if it fails to state a cause of action against the defendant, the demurrer ought to be sustained and if sustained the plaintiff ought to have an opportunity to file an Amended Petition.

After the trial starts, then the situation is somewhat different and if the plaintiff cannot introduce any evidence on that Petition by reason of its failing to state a cause of action, then it seems to me that the issues have been adjudicated and if the issues have been adjudicated, then there is no vehicle for readjudicating them at a different time. This would be the case if the plaintiff would be able to dismiss his case and refile it.

The Court recognizes that in the past the plaintiffs have been entitled to dismiss their lawsuits at any stage of the proceedings, even while the jury is out and deliberating on its decisions but the modern trend has been against that. Whenever the parties come to court and are ready for trial and they start to trial and if there is any adjudication of the merits, then that adjudication ought to be final. The new rules of the Supreme Court adopting rules for the District Court dated September 1, 1973, appear to adopt and recognize the modern trend.

For instance Rule 4 e, which provides substantially that a Motion for Judgment on the pleadings, demurrer to the pleadings, and objection to the introduction of evidence is the basis for a final judgment.

Again the Court reiterates it isn't exercising any discretion and will decide this case only on the question of whether the plaintiff has the right to dismiss without prejudice at this stage of the proceedings.

The Court is of the opinion that the issues were joined, such issues being whether the plaintiff was entitled to recover against the defendant, and it became obvious in the argument of counsel and perhaps in remarks made by the Court that the plaintiff could not recover. Therefore, some disposition had to be made of the case. The plaintiff moved to dismiss. The Court is of the opinion the plaintiff does not of right have the right to dismiss without prejudice. Therefore, the dismissal by the plaintiff will be considered to be a Motion to Dismiss and that Motion to Dismiss is denied with exceptions being allowed the plaintiff.

Said Motion to Dismiss being denied, then it is incumbent upon the Court to pass upon the other motions and objections.

Upon plaintiff's Motion for Directed Verdict, upon statement of counsel, same is overruled with exceptions allowed.

Upon motion of defendant for judgment upon defendant's opening statement, same is overruled with exceptions.

Objection of the defendant to the introduction of evidence for the reason that the Petition failed to state a cause of action

is sustained with exceptions to the plaintiff and the case is dismissed at the cost of the plaintiff.

To all rulings of the Court the aggreived party is granted exceptions.

All right, gentlemen. Anything else you would like in the record?

MR. FREEMAN: Comes now the plaintiff and moves the the Court for leave to file an Amended Petition.

THE COURT: The Court is of the opinion that the judgment of dismissal entered by the Court is the final judgment and that it is res judicata and, therefore, request for leave to file an Amended Petition would only be appropriate if the case has not been adjudicated.

Therefore, leave to file an Amended Petition will be denied. Exceptions allowed.

MR. FREEMAN: At this time the plaintiff gives notice in open court of intention to appeal to the Supreme Court.

THE COURT: Very well. The clerk is directed to note the intention to appeal on the appearance docket. No bond is required.

CERTIFICATE

I, Mary O'Leary, Official Court Reporter, of the District Court of Oklahoma County, State of Oklahoma, do hereby certify that on April 8, 1974, in Oklahoma County, State of Oklahoma, before Honorable Carmon C. Harris, I reported in shorthand the proceedings had in the foregoing cause, and the foregoing is a true and correct copy of my shorthand notes, of the findings of the Court in said cause.

_____

/S/MARY O'LEARY
OFFICIAL COURT REPORTER
821 County Courthouse
Oklahoma City, Oklahoma

IN THE COURT OF APPEALS, DIVISION 2

STATE OF OKLAHOMA

Henry C. Sanders,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 47,461
	)	
E. E. "Ike" Zamrzla,	)	
	)	
Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

Honorable Carmon C. Harris, Trial Judge

Action by client against attorney for negligent handling of personal injury action. Client appeals rulings of trial court refusing to permit him to discuss the action without prejudice, sustaining attorney's objection to the introduction of evidence, and not allowing client to amend his petition.

REVERSED WITH DIRECTIONS

Freeman & Freeman
Oklahoma City, Oklahoma — For Appellant

Richard D. Hampton &
James C. Hanna
Oklahoma City, Oklahoma — For Appellee

NEPTUNE, P. J.

In December 1972 plaintiff Sanders commenced this action for damages against defendant Zamrzla, a licensed

EXHIBIT B

attorney-at-law, asserting defendant's negligent handling of plaintiff's personal injury action by allowing the statute of limitations to bar plaintiff's claim. Defendant Zamrzla demurred to the petition and after it was overruled, answered with a general denial.

At trial before a jury on April 8, 1974, after opening statements by both parties, plaintiff moved for judgment on the opening statement as to the issue of liability of defendant. The motion was overruled by the trial court. Defendant renewed his demurrer to the petition urging that it did not state a cause of action and also objected to the introduction of any evidence by plaintiff.

The court recessed the jury to afford opportunity for arguments by counsel on defendant's demurrer and objection. At this time plaintiff recited in open court: "Comes now the plaintiff at this time and dismisses his petition." Dismissal was objected to by defendant. Arguments and recesses continued throughout the afternoon. Plaintiff then submitted and filed his written dismissal without prejudice.

The trial court then made the following rulings: First, that plaintiff could not dismiss the suit as a matter of right, and therefore the statement of dismissal would be treated as a motion for dismissal. The court denied the motion to dismiss. It then sustained the objection of defendant to the introduction of any evidence for the reason that the petition did not state a cause of action for which relief could be granted. Whereupon plaintiff then asked leave to amend his petition which was denied by the trial court for the reason that the judgment was a final judgment and res judicata, therefore prohibiting the amending of the petition.

Plaintiff appeals claiming error of the trial court in not allowing his dismissal without prejudice, in treating the dismissal as a motion to dismiss and in refusing the amendment to the petition. Plaintiff requests that we reverse the judgment of the trial court and either grant the dismissal without prejudice or allow him to file an amendment to the

petition. We agree that the trial court's ruling was erroneous and reverse with instructions that a dismissal without prejudice be granted to plaintiff.

Title 12 O.S.1971 § 683 reads, in part, that:

> "An action may be dismissed, without prejudice to a future action: First, By the plaintiff, before the final submission of the case to the jury, or to the court, where the trial is by the court."

In the instant case, the trial had proceeded no further than the opening statements when the aforementioned motions were interposed and plaintiff attempted to dismiss the action without prejudice.

In Tiffany v. Tiffany, 200 Okl. 670, 199 P.2d 606 (1948) the court syllabus, in interpreting § 683 stated:

> "Final submission of a case . . . contemplates its final submission upon the law and the facts and in a case tried to the court where the evidence has been concluded and time given to counsel for **future argument** or future filing of briefs, the cause is not finally submitted and plaintiff may dismiss without prejudice." (emphasis ours)

Under the facts in the instant case there clearly has not been a final submission of the case within this definition. Here the statement of dismissal was communicated to the court before argument on the objection to the introduction of evidence had begun. Under these facts plaintiff clearly possessed the right to dismiss without prejudice under § 683.

An Oklahoma case involving a situation almost identical to the instant case is Carpenter v. Renner, 158 Okl. 153, 12 P.2d 688 (1932). There, however, plaintiff waited until after the court intimated that it would sustain the objection

to the introduction of the evidence on the grounds that the petition failed to state a cause of action before he attempted to dismiss the action without prejudice. In reversing the trial court's action and allowing the dismissal the court in **Carpenter** stated:

> "The cause in the instant case was not submitted to the court for its determination upon the merits. The sustaining of an objection to the introduction of evidence was equivalent to sustaining a demurrer to the petition. Therefore plaintiff **had a legal right, under the statute, upon sustaining of such objection, to dismiss his case without prejudice.**" (emphasis ours)

We therefore conclude, as to plaintiff's second proposition, that the trial court erred in considering plaintiff's dismissal as a motion to dismiss and in overruling same.

Accordingly, we reverse the judgment of the trial court with instructions that plaintiff be granted a dismissal without prejudice to refile the case.

While not necessary for the disposition of the case, we further agree with plaintiff that the trial court erred in not permitting him leave to amend his petition. Title 12 O.S.1971 §318 states:

> "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct."

Here the petition was previously held sufficient upon challenge by a demurrer. After the sustaining of defendant's objection to the introduction of evidence plaintiff immediately requested leave to amend his petition. The defects, if any, involved in the petition were minor and could have been

cured by amendments without altering the cause of action or working a surprise upon defendant.

"The controlling test governing the propriety of permitting amendments to the petition should be whether the ends of justice will be promoted by such amendment." Doyle v. Oklahoma Press Pub. Co., 206 Okl. 254, 242 P.2d 155 (1951). In the instant case, justice would be better served by allowance of the amendments and a full trial of the cause before a jury on the merits. Therefore the denial by the trial court of the request was an abuse of discretion. The trial court order of April 8, 1974, should be vacated.

Reversed with directions to vacate the order of April 8, 1974, and to approve and effectuate the plaintiff's dismissal without prejudice.

BACON, J., and BRIGHTMIRE, J., concur.

IN THE COURT OF APPEALS, DIVISION 2
STATE OF OKLAHOMA

Thursday, September 4, 1975

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

47,461 Henry C. Sanders, Appellant, v. E. E. "Ike" Zamrzla, Appellee.

Appellee's Petition for Rehearing denied.

/S/ROBERT H. NEPTUNE
Presiding Judge

EXHIBIT C

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Tuesday, October 28, 1975

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

47,461 Henry C. Sanders v. E. E. "Ike" Zamrzla.
Certiorari denied.

/S/BEN WILLIAMS
CHIEF JUSTICE

EXHIBIT D